



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Woodington Corporation

File: B-235957

Date: October 11, 1989

DIGEST

1. An amendment which incorporates into an invitation for bids a Federal Acquisition Regulation provision under which the government may withhold fees or profits from a contractor for violations of the Office of Federal Procurement Policy Act is material since it gives the government the right to impose contractual penalties which otherwise would not be available to it and therefore changes the legal relationship between the parties.
2. A bidder's failure to acknowledge with its bid a material amendment to an invitation for bids renders the bid nonresponsive.

DECISION

Woodington Corporation protests the proposed award of a contract to T.A. Loving, Inc., under invitation for bids (IFB) No. DTCGB3-89-B-62046, issued by the Coast Guard for installation of a waste water treatment facility. Woodington contends that since T.A. Loving failed to acknowledge three solicitation amendments, the company's bid is nonresponsive.

We sustain the protest.

The Coast Guard issued the IFB on May 1, 1989, with bid opening scheduled for June 1. Prior to bid opening, the Coast Guard issued three amendments to the IFB. Amendment No. 0001 replaced the 1988 version of the Davis-Bacon Area Wage Rates included in the IFB with the 1989 version. Amendment No. 0002 extended the period of contract performance from 120 days to 270 days. Amendment No. 0003 incorporated certain standard clauses pertaining to certifications regarding debarment and suspension;

046717/139748

procurement integrity; and contracting with certain sanctioned persons.

T.A. Loving, the low bidder, failed to acknowledge the amendments, maintaining that they were never received; the firm subsequently acknowledged the amendments on June 2. Despite the firm's failure to acknowledge the amendments before bid opening, the contracting officer found T.A. Loving's bid responsive. Woodington now challenges the contracting officer's determination that T.A. Loving's nonacknowledgment was a "minor informality" and contends that T.A. Loving's bid was nonresponsive. We agree.

A bid that does not include an acknowledgment of a material amendment must be rejected because, absent such an acknowledgment, the bidder is not obligated to comply with the terms of the amendment, and thus its bid is nonresponsive. Great Lakes Dredge & Dock Co., B-213551, Dec. 13, 1983, 83-2 CPD ¶ 681. Even where an amendment may not have a clear effect on price, quantity or quality, it nonetheless is considered material where it changes the legal relationship between the parties, as, for example, if the amendment increases or changes the contractor's obligation or responsibilities. Mak's Cuisine, B-227017, June 11, 1987, 87-1 CPD ¶ 586. The materiality of the amendment is not diminished by the fact that the amendment has little or no effect on the bid price or the work to be performed. Reliable Building Maintenance, Inc., B-211598, Sept. 19, 1983, 83-2 CPD ¶ 344.

Here, amendment No. 3 in part incorporated a new standard Federal Acquisition Regulation (FAR) provision, § 52.203-10, entitled "Remedies for Illegal or Improper Activity," which implements the Office of Federal Procurement Policy (OFPP) Act Amendments of 1988, § 27(f), 101 Stat. 4055, 4065 (1988). Section 27(a) of the Act generally prohibits certain activities by contractors relating to offers of gratuities to procurement officials and solicitation of proprietary or source selection information during the conduct of a procurement. Section 27(f) of the Act provides in pertinent part as follows:

"Contractual Penalties--(1) Regulations issued pursuant to subsection (m) shall require that each contract awarded by a Federal agency contain a clause specified in such regulation that provides appropriate contractual penalties for conduct of any competing contractor prohibited by subsection (a) and for any such conduct of any officer, employee,

agent, representative, or consultant of such contractor.

(2) The following remedies are authorized to be included in, and shall be considered in the development of, such regulations:

(A) Denial of payment of all or any portion of the profit component of amounts otherwise payable to the contractor by the Federal agency under the contract and recovery of all or any portion of the profit component of amounts paid to the contractor by the Federal agency under the contract.

(B) Termination of the contract for default.

(C) Any other appropriate penalty."

FAR § 52.203-10, which implements the statutory provision, provides in pertinent part that the contracting agency may elect to reduce the price of a fixed-price type contract and the total cost and fee under a cost-type contract if it determines that there was a violation of the OFPP Act requirements regarding gratuities and source selection or proprietary information. FAR § 52.203-10(a). In addition, under FAR § 52.203-10(d), the contracting agency reserves the right to reduce a prime contractor's fee or profit for violations of the Act by its subcontractors.^{1/}

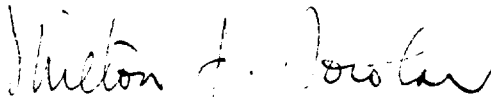
The effect of the FAR provision is to give the government the right to impose contractual penalties on the contractor--withholding profits or fees due to violations of the OFPP Act by the contractor or its subcontractors--which otherwise would not be available to it. Since the provision thus changes the legal relationship between the parties, the

^{1/} The original effective date of the OFPP Act was May 16, 1989. Interim FAR provisions implementing the Act were issued on May 11, stating that they applied to contracts awarded on or after May 16. On May 15, however, Congress postponed the effective date of the OFPP Act to July 16. The FAR provisions were not suspended, nor were the clauses incorporated into the IFB by amendment No. 3 deleted from the IFB, during the 60-day period between the original and amended effective dates. Since award has not yet been made, the Act would apply to any contract ultimately awarded under the IFB.

amendment incorporating it into the IFB clearly was material. Mak's Cuisine, B-227017, supra. Accordingly, we find that T.A. Loving's failure to acknowledge the amendment could not be waived by the contracting officer and rendered its bid nonresponsive. Id. In view of our conclusion, we need not consider whether the contracting officer properly waived the firm's failure to acknowledge amendment Nos. 0001 and 0002 or the remainder of amendment No. 0003.

Based on our finding that T.A. Loving failed to acknowledge a material amendment, we recommend that T.A. Loving's bid be rejected and that award be made to Woodington, the next low responsive bidder, if otherwise appropriate. In addition, Woodington is entitled to recover the costs of filing and pursuing the protest, including attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.6(d)(1) (1989).

The protest is sustained.


for Comptroller General
of the United States